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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,

Defendants.

Case No. 1-13-CV-245503

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAN JOSE POLICE OFFICERS' ASSOCIATION'S OPPOSITION TO APPLICATION TO INTERVENE

Date: April 5, 2016
Time: 9:00 a.m.
Dept.; 7
Judge: Hon. Beth McGowen

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I.

INTRODUCTION

This case has already settled. In July 2015, the City of San Jose (the "City") and the San Jose Police Officers' Association (the "POA"), collectively "the parties," reached a comprehensive "Settlement Framework" to resolve litigation over a pension measure known as Measure B. The Settlement Framework achieves legal pension reform, which the City estimates will save taxpayers approximately $3 billion over 30 years. Once the Attorney General[1] approved the final settlement documents, the parties submitted them to the court.

One day later, on March 9, 2016, Peter Constant, Steven Haug and the Silicon Valley Taxpayers Association (the "Applicants") filed their Application to Intervene (the "application"). The Applicants are a former city councilmember, a taxpayer and a taxpayer group, who do not like the terms of the Settlement Framework. They seek to block the settlement and force the City to litigate the underlying claims in the case even though the City Council voted to settle them.

The application should be denied. The Applicants have neither standing nor grounds to intervene under Code of Civil Procedure ("CCP") sections 387 (a) or (b). If they disapproved of the City Council's decision to settle the litigation, they were entitled to lobby against it. If they believed the City's exercise of its legislative prerogative to settle the case was an *ultra vires* act (and the POA doubts such a claim exists), Applicants could have sued to undo it in July 2015. But the Applicants cannot reframe those animosities as grounds to intervene.

First, the application is untimely. The public announcement of the Settlement Framework in July 2015 (the City's papers point out even earlier alerts) advised the Applicants that the City was no longer defending Measure B. Inexcusably, the Applicants delayed for almost eight months before filing their application, by which time the parties had, with the Attorney General's approval, submitted the final settlement documents to the Court. This untimeliness warrants denial of the application.

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[1] A party may only challenge the procedural validity of a municipal election through a petition for writ of *quo warranto* action. Such actions must be approved by the Attorney General, who retains a gatekeeper role over the litigation.

Second, the Applicants cannot establish intervention by right (CCP § 387(b)) or permissively (CCP § 387(a)) because they have no direct interest in the "property or transaction" at issue in this *quo warranto* action. The sole issue is whether the City adequately met and conferred with the POA before placing Measure B on the ballot. Whether the case determines the City did or did not satisfy this obligation, Applicants have nothing direct at issue.

Even if the Applicants had a direct interest in this case, the reputational and economic interests they assert are too speculative and generalized to permit intervention. Furthermore, as their proposed complaint in intervention establishes, Applicants would impermissibly try to litigate the validity of the Settlement Framework, thereby impermissibly expanding the issues in the case.

Finally, the application is vigorously opposed by the parties. The City and the POA declarants highlight the debilitating effect that allowing intervention and delaying the implementation of the settlement would have on the City's efforts to rebuild its police department, public safety, and police officer safety.

II.

BACKGROUND

On March 6, 2012, the San Jose City Council approved Resolution 76158, which required that a measure, designated as "Measure B" be placed on the June 2012 primary election ballot. After Measure B passed, six substantive challenges and four procedural challenges, including the instant action, quickly followed. (Duenas decl. at ¶ 10.)

The substantive challenges were filed in the Santa Clara County Superior Court and were consolidated for trial before Judge Patricia Lucas. Following a five-day trial in July 2013, a statement of decision issued on February 20, 2014, in which Judge Lucas adjudged four parts of Measure B unconstitutional. (Adam decl. at ¶ 3.) All parties appealed, but briefing in the appeal has not yet begun. (*Id.* at ¶ 4.)

In April 2013, the Attorney General authorized the POA to file this *quo warranto* action which asserts that the City violated its statutory obligation to meet and confer in good faith prior to placing Measure B on the ballot. (City RJN, Exh. C.) Pursuant to the California Supreme Court's

landmark ruling in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 ("Seal Beach"), a public agency must fulfill its meet and confer obligations under the Meyers-Milias-Brown Act[2] before it can place a measure that affects employee working conditions on the ballot. (*Id.* at p. 602.) If the entity fails to adequately meet and confer, the Charter measure is set aside. (*Id.* [charter measure set aside for failing to meet and confer].)

On November 5, 2014, California Public Employment Relations Board Administrative Law Judge Eric Cu, ruling on an unfair labor practice charge filed by the San Jose Fire Fighters, IAFF Local 230 ("Local 230"), held that the City violated its bargaining obligations before voting to place Measure B on the ballot. (Platten decl. at ¶ 7, Exh. 1.) This ruling is significant because Local 230 and the POA negotiated in coalition and, therefore, the PERB and *quo warranto* actions are basically the same case. Judge Cu ordered the City to rescind Resolution 71658. (*Id.*) His decision is currently pending on appeal before the PERB Board. (*Id.* at ¶ 9.)

On the same date, Judge Cu sustained a different labor union's claim that the City violated its bargaining obligations when it placed Measure B on the ballot. (*Id.* at ¶ 8, Exh. 2.)

III.

LEGAL ARGUMENT

A. The Application Is Untimely.

Assuming *arguendo* that Applicants had direct interests in the case (but see part III. B and C below), their eight-month delay after the Settlement Framework was announced before applying to intervene disqualifies the application. CCP section 387 subdivisions (a) and (b), which govern mandatory and permissive motions to intervene, are modeled after and "virtually identical" to Rule 24 of the Federal Rules of Civil Procedure. (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 555.) California courts give section 387 the same meaning, force, and effect as Rule 24. (*Id.* at 556.)

An applicant must assert its right to seek to intervene within a reasonable time and without unreasonable delay. (*Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 108.) Timeliness

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[2] Government Code section 3500 *et seq.* is the California statutory scheme governing labor relations between the City of San Jose and associations of its employees, including the POA.

is measured by the speed with which the proposed intervener acts when it becomes aware its interests are no longer protected adequately by the parties. (*See, e.g., Cal. Dept. of Toxic Substances v. Commer. Realty* (9th Cir. 2002) 309 F.3d 1113, 1120.)

The Applicants dodge the question of when exactly they knew about the Settlement Framework. (See, *e.g.*, Constant decl. at ¶ 19.) But as supporters of Measure B, it is inconceivable that they were unaware of the Settlement Framework when it was publicly announced in July 2015 or earlier, as the City argues. (Duenas decl. at ¶¶ 5-8; Gonzalez decl. at ¶ 5; City RJN, Exh. G.) And notwithstanding certain conditions precedent to *finalizing* the settlement, these public announcements triggered Applicants' obligation to move timely to intervene because it put them on notice that the City would no longer defend Measure B. Their subsequent eight-month delay bars the application as untimely. (*Officers for Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1991) 934 F.2d 1092, 1095 [substantial delay weighs heavily against intervention]; *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 842 [application denied where company delayed until comprehensive settlement reached between the parties].)

The Applicants try to excuse their delay. They falsely claim that the parties "agree[] intervention is appropriate at this stage." While the Settlement Framework contemplated that Local 230 might intervene *back in July 2015*, that was quickly deemed to be unnecessary. (Adam decl. at ¶ 5; Platten decl. at ¶ 12.)

Finally, the Applicants seize on a single ambiguous sentence in a City memorandum (Constant decl. at ¶ 19) and mistakenly argue that the *quo warranto* process was not "initiated" until recently. The *quo warranto* process was initiated in April 2013, when the POA received permission to sue. (City RJN, Exh. C.) The issue in the case has already been extensively litigated in the Local 230 PERB action. (City Opp. at p. 5; Platten decl. at ¶ 7, Exh. 1.) Three hearings in the case have occurred *since* the settlement announcement. (Adam decl. at ¶ 6.) The Attorney General has approved the settlement. Only final settlement of the case remains.

The Application can and should be denied on the basis of being untimely.

B. The Applicants Fail to Establish a Direct Interest Relating to the Subject of This *Quo Warranto* Action.

The Applicants fail to meet their threshold burden of establishing a "significantly protectable" interest in this *quo warranto* action. (*Forest Conservation Council v. United States Forest Service* (9th Cir.1995) 66 F.3d 1489, 1493.) To permit them to intervene as a right, they must show an interest that relates to the "transaction which is the subject of the litigation." (CCP §387(b).)

The Applicants' problem is that, however much they try, they cannot shoehorn their opposition to the Settlement Framework into a protectable interest *in the subject matter of this case*. Any interest the Applicants have in Measure B is affected solely *as a consequence of* the *outcome* of this case—it is not directly at issue. The interests they assert (MPA iso Appl. at pp. 7-10) arose only *after* the passage of Measure, whereas the transaction in this litigation is whether the City adequately bargained *before* placing Measure B on the ballot. The only interests directly affected by the subject matter of this litigation belong to the City, on one hand, and the POA and its members on the other. The case concerns the statutory bargaining process, and Applicants literally and figuratively have no seat at the table.

Even if Measure B itself, as opposed to the negotiations which preceded it, was at issue, the Applicants' asserted interests are too speculative and indirect to meet CCP section 389(b)'s criteria for intervention.

Federal courts interpreting FRCP 24 have rejected SVTA's and Haug's taxpayer and voter interests (MPA iso Appl. at pp. 9-10) as being the same "undifferentiated, generalized interest" as any member of the public, and "too porous a foundation on which to premise intervention as of right." (*Public Serv. Co. of N.H. v. Patch* (1st Cir. 1998) 136 F.3d 197, 205.) In *Patch*, the motion to intervene by ratepayers and their advocates was denied because their purported economic interest "operate[d] at too high a level of generality." (*Id.*; *Westlands Water Dist. v. U.S.* (9th Cir. 1983) 700 F.2d 561, 563 [Environmental Defense Fund's interest in water export rights no different from interest of "substantial portion of the population of northern California" and is thus not "legally protectable" under Rule 24(a)].) The Applicants' "economic interest in the

outcome of the litigation is not itself sufficient to warrant mandatory intervention." (*Medical Liability Mut. Ins. Co. v. Alan Curtis LLC* (8th Cir. 2007) 485 F.3d 1006, 1008.)

Likewise, the reputational interest asserted by Applicant Constant is "too indirect and insubstantial to be 'legally protectable.'"[3] (*Floyd v. City of New York* (2nd Cir. 2014) 770 F.3d 1051, 1060-61 [police union motion to intervene in stop-and-frisk litigation denied].) Like in *Floyd*, Applicant Constant submits no evidence, aside from his own assertions, that his career may be been tarnished by anything at issue in this case. (*Id.*; *Edmondson v. State of Nebraska* (8th Cir. 1967) 383 F.2d 123, 127 [mere fact of injury to reputation is not enough to warrant mandatory intervention]; *Sierra Club v. United States Army Corps. of Engineers* (2d Cir. 1983) 709 F.2d 175, 176 [intervenor's interest in professional reputation not related to merits of underlying action].)

The voter-taxpayers-reputational interests asserted by Applicants are simply "too 'remote from the subject matter of the proceeding' to be legally protectable." (*Floyd, supra,* 770 F.3d at pp. 1060-1061.) They therefore cannot establish a right to intervene under CCP section 387(b).

C. The Applicants Do Not Meet the Standard For Permissive Intervention.

The Applicants' fallback argument of seeking permissive intervention under CCP section 387(a) is no more availing. The Applicants must persuade the Court that they have an immediate and direct interest in the case; intervention will not enlarge the issues in the case; *and* the reasons for intervention outweigh any opposition by the parties (which here is vigorous), in order to be permitted to intervene. (*City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1036 ("*CCSF*").)

1. The Applicants have no direct and immediate interest in the action.

CCP section 387(a) parallels subsection (b) by requiring that the applicant establish a "direct rather than consequential" interest "that is capable of determination in the action." (*CCSF, supra*, 128 Cal.App.4th at p. 1037.) Indirect harm to a proposed intervenor's interest is not enough, "the direct legal operation and effect of the judgment" must harm its interests. (*Id.*)

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[3] The City refutes in its brief Mr. Constant's assertion that as an author of Measure B (he was not) and a participant in the pension system, he has a protectable interest in this litigation. (City Opp. at pp. 6-7.)

As explained above, in part B, the Applicants cannot show anything beyond a speculative consequential interest in the result of the case. The direct legal operation of the Stipulated Judgment applies only to the City and its Council.

2. Intervention would impermissibly enlarge the issues in the litigation.

The proposed complaint in intervention suggests that the Applicants would dramatically enlarge the issues in the litigation, in violation of Code Civil Procedure section 387, subdivision (a)(3). This follows because the Proposed Complaint in Intervention shows that the Applicants want to extend the litigation beyond the single issue in this case to attack the Settlement Framework.

The only current issue is whether the City fulfilled its statutory bargaining obligations. If granted permission to intervene, the current scope of the litigation would limit the Applicants to arguing that the City had fulfilled its bargaining obligation—something the City is no longer prepared to do. (City Opp. at p. 12.) But according to the Proposed Complaint in Intervention, the Applicants appear to want to litigate at least the following additional issues:

(1) Whether the settlement agreement exceeds the scope of the permission to sue granted to the POA by the Attorney General (Compl. in Int. at ¶ 9);

(2) Whether the settlement of this case impermissibly affects non-parties and resolves related actions (*id.* at ¶ 11);

(3) Whether the settlement "judicially substitutes other provisions for Measure B without any legislative process" (*id.* at ¶ 12);

(4) Whether the City has "a duty to defend Measure B on behalf of its citizens" (*id.* at ¶¶ 32, 33);

(5) Whether "the City has abdicated its duty to defend Measure B" (*id.* at ¶¶ 32, 33);

(6) Whether any such duty prohibits the City from settling this action (*id.*); and

(7) Whether the stipulated judgment violates the rights of the voters and the Applicants (*id.* at ¶ 35).

The proposed complaint in intervention reveals that granting intervention would enlarge the issues in the litigation in violation of CCP section 387(a).

3. The reasons for the intervention are heavily outweighed by the parties' opposition to the application.

Finally, the Applicants have not established that the reasons for the intervention outweigh the vigorous opposition of the parties. (Code Civ. Proc., § 387, subd. (a)(2).)

The supporting declarations of City Manager Norberto Duenas, Chief of Police Edgardo Garcia, Paul Kelly, the POA president, and James Gonzales, the POA vice-president, underline the strong opposition of the parties to the application. Delaying the parties' settlement agreement will undermine the efforts of the SJPD to protect the citizens of San Jose, hamper its recruitment efforts, and encourage more officers to leave, further undermining public and officer safety (Garcia decl. at ¶¶ 4-15; Duenas decl. at ¶ 12; Kelly decl. at ¶¶ 2-7; Gonzales decl. at ¶¶ 3-4, 6); jeopardize $3 billion of negotiated savings (Duenas decl. at ¶ 15); reignite up to 10 other legal actions against the City (*id.* at ¶ 11); and likely prevent the placement of a new ballot before voters until 2018. (City RJN, Exh. J; Duenas decl. at ¶ 15.)

Weighed against the generalized and uncertain economic and reputational interests asserted by the Applicants, the parties prevail on a balancing of their respective interests.

IV.

CONCLUSION

For all of the foregoing reasons, the POA requests that the Court deny the application.

Dated: March 23, 2016

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